

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

75-4051

To be argued by
SYDNEY B. WERTHEIMER

United States Court of Appeals
FOR THE SECOND CIRCUIT

FEDDERS CORPORATION,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

WEISMAN, CELLER, SPETT, MODLIN &
WERTHEIMER, Esqs.
Attorneys for Petitioner
425 Park Avenue
New York, New York 10022

SYDNEY B. WERTHEIMER,
JEFFREY H. SCHNEIDER,
Of Counsel

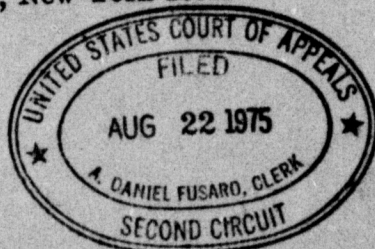


TABLE OF CONTENTS

	PAGE
POINT I—Commission counsel have failed to demonstrate that, in essence, Fedders misrepresented anything other than the uniqueness of the reserve cooling power feature	1
POINT II—Commission counsel do not deny the wide difference in effect between falsely claiming a performance characteristic and falsely asserting the uniqueness of a validly claimed performance characteristic	5
POINT III—The Commission's order, and Commission counsel's Brief, deal cavalierly with the background factors that must be given weight in determining the appropriate scope of the order	10
POINT IV—Fedders failure to heretofore seek to modify the order so as to eliminate the necessity of objective proof of subjective claims does not preclude this Court from granting such relief, which, as a matter of fundamental justice, should be granted	14
Conclusion	16
Exhibit A—Copies of certain advertisements	16

TABLE OF AUTHORITIES

<i>Blier v. United States Lines Company</i> , 286 F.2d 920, 922 (2d Cir. 1961)	14
<i>Country Tweeds, Inc. v. F.T.C.</i> , 326 F.2d 144 (2d Cir. 1964)	7, 13

	PAGE
<i>F.T.C. v. Colgate-Palmolive Co.</i> , 380 U.S. 374 (1965)	4, 6, 7, 12
<i>Firestone Tire and Rubber Co.</i> , 481 F.2d 246 (6th Cir. 1973), <i>cert. denied</i> , 414 U.S. 1112 (1961)	6, 9, 12
<i>Hormel v. Helvering</i> , 312 U.S. 522 (1940)	14
<i>Moog Industries v. F.T.C.</i> , 355 U.S. 411 (1958)	14
<i>National Dynamics Corporation v. F.T.C.</i> , 492 F.2d 1333 (2d Cir. 1974)	6, 7, 8
<i>Pfizer, Inc.</i> , Docket 8819, 81 FTC 23 (1972)	3
<i>Schenfeld v. Norton Co.</i> , 391 F.2d 420, 424-425 (10th Cir. 1968)	15
<i>Swanee Paper Corporation v. F.T.C.</i> , 291 F.2d 833 (2d Cir. 1961), <i>cert. denied</i> , 368 U.S. 987 (1961)	13
<i>Troupe v. Chicago D. & G. Transit Co.</i> , 234 F.2d 253, 259 (2d Cir. 1956)	15
<i>United States v. L. A. Tucker Truck Lines</i> , 344 U.S. 33 (1952)	14
<i>William H. Rorer, Inc. v. Federal Trade Commission</i> , 374 F.2d 622 (2d Cir. 1967)	5, 8, 12

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

FEDDERS CORPORATION,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

POINT I

Commission Counsel Have Failed to Demonstrate That, in Essence, Fedders Misrepresented Anything Other Than the Uniqueness of the Reserve Cooling Power Feature.

Commission counsel repeatedly assert (Commission's Brief, pp. 2, 11, 20) that the Commission found and Fedders admitted that Fedders' advertisements, in addition to falsely representing that its products were unique in that they were the only ones which possessed the characteristic or capability known as "reserve cooling power", made two other separate and distinct false representations, namely:

(a) That Fedders' air conditioners, as compared with all other air conditioners, had a significantly increased cooling capacity at high loading conditions; and

(b) That Fedders had a reasonable basis for concluding that its air conditioners were unique in the aforesaid respect.

On the strength of their assumption that these separate representations were made and were false, Commission counsel proceed to the conclusion that respondent was "found to violate the law in more than one way" (Commission's Brief, p. 19).

But counsel's assumption is clearly erroneous. First of all, as set forth at page 6 of Fedders' Brief, the Administrative Law Judge specifically found (Appendix 60a) that the only representations challenged by the complaint "arise from the 'uniqueness' claim for Fedders air conditioners", and that "respondent's advertisements, which utilize reserve cooling power, but which do not claim uniqueness for this feature, are not challenged in the complaint." These findings, among others, were adopted by the Commission (Appendix 81a).

Furthermore, as hereinafter demonstrated, the representations admitted by Fedders' answer to the final complaint herein (Answer to Further Amended Complaint, Appendix 27a-28a) are essentially identical.

At paragraph 3 of the aforesaid Answer (Appendix 27a) Fedders admitted that, by making the statement specifically set forth in paragraph Six of the complaint; to wit,

"Reserve Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days." (Appendix 9a)

Fedders "represented that reserve cooling power is a unique feature of Fedders air conditioners." By stipulated definition herein (Appendix 28a) "reserve cooling power" means "ability to function satisfactorily under conditions of extreme heat and humidity". Consequently, it is

obvious that when Fedders, at paragraph 5 of its Answer to Further Amended Complaint (Appendix 28a) admitted that by the use of the very same statement it had represented by implication, that it had a reasonable basis for concluding that "Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity" Fedders was merely saying the same thing in slightly different words. It cannot be denied that claiming that a particular product, compared with *all* others of its kind, is "significantly superior" in respect to a particular feature is no different from saying that it enjoys a unique status with respect to that feature. Nor can it be denied that when an advertiser makes a claim of uniqueness or any other claim, it represents, *ipso facto*, that it has a reasonable basis for making the claim.*

Moreover, it is plain that Commissioner Dixon, speaking for the Commission, did not consider that in this case there was a "superiority of performance" representation separate from the uniqueness representation, but rather that he considered that a uniqueness claim is necessarily, in and of itself, a performance claim.

The Opinion of the Commission states:

"In claiming that only Fedders' air conditioning possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What renders these false representations material in the eyes of consumers and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of 'uniqueness' in some disembodied sense". . . ." (Appendix, p. 90a)

* Indeed, the Commission has warmly espoused this position (see Pfizer, Inc., Docket 8819, 81 FTC 23 (1972)).

"5. . . . Uniqueness is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance, and warranty terms." (Appendix, p. 90a, footnote)

Therefore, having swept away Commission counsel's red herring that the Commission found, and respondent admitted, that respondent had made three separate false claims, let us address ourselves to the real issue presented, namely, whether it is true that a uniqueness claim is, in and of itself, a performance claim. It is respectfully submitted that it is not, and that the Commission clearly erred in so holding.

As a threshold matter it should be noted that Commission counsel's reliance, at page 14 of their Brief, upon *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), which supports the concededly valid proposition that more than one misrepresentation may be made in a single advertisement, is misplaced. In *Colgate-Palmolive* the same television commercial contained two separate and distinct misrepresentations; first, that the product was capable of rapidly moisturizing sandpaper; and, second, that the shaved substance shown in the commercial was actually sandpaper whereas in fact it was a plexiglass simulation of sandpaper (380 U.S. at pp. 376-77). But the proposition for which *Colgate-Palmolive* stands has no application to the case at bar, where the question is not whether the same advertisement *can* contain two separate and distinct representations, but whether, in fact, it *does*. The difference between separate and independent representations and a representation which is essentially the same as another (though expressed slightly differently) or is merely a necessary corollary of the other, is obvious.

POINT II

Commission Counsel Do Not Deny the Wide Difference in Effect Between Falsely Claiming a Performance Characteristic and Falsely Asserting the Uniqueness of a Validly Claimed Performance Characteristic.

Commission counsel have not seen fit to challenge Fedders' position, discussed at length at pp. 16-19 of Fedders' Brief, that there is a wide difference, in practical effect as well as semantically, between claiming that your product has a quality or characteristic which it does not in fact possess, and, on the other hand, in respect to a characteristic which your product undisputably *does* possess, falsely claiming that it is the only product which possesses it; and that the difference is so wide that a false performance claim is not simply a "variation upon the basic theme" of a uniqueness claim but is an offense so distinct, and of such greater gravity, that it cannot be considered as "like or related."

There is little difference between the contending principal briefs on this appeal as to the basic legal principles applicable to the permissible scope of Commission orders; the dispute lies in the application of those principles to the nature of Fedders' misrepresentation and the circumstances surrounding it. Both the Supreme Court and this Court have emphasized the necessity, in framing the scope of cease and desist orders, of careful analysis of the factual background.

In *William H. Rorer, Inc. v. Federal Trade Commission*, 374 F.2d 622 (2d Cir. 1967), this Court stated at p. 626:

" . . . we will not mechanically approve broad 2(a) orders—and indeed suggest that careful fashioning of the orders best serves the legitimate interests of all concerned"

In *Colgate-Palmolive, supra*, the Supreme Court stated, at pp. 384-85:

"It is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business'."

Commission counsel, in seeking to justify the breadth of the Commission's order herein, rely heavily upon *Rorer, supra*, *Colgate-Palmolive, supra*, *National Dynamics Corporation v. Federal Trade Commission*, 492 F.2d 1333 (2d Cir. 1974); and *Firestone Tire and Rubber Co.*, 481 F.2d 246 (6th Cir. 1973), *cert. denied* 414 U.S. 1112 (1973). They assert that *National Dynamics* "should be controlling in rejecting Fedders' contentions" (Commission's Brief, p. 13) and characterize *Rorer* as a "remarkably similar case" (Commission's Brief, p. 16). However, they fail to demonstrate why *National Dynamics* should be controlling or why *Rorer* is "remarkably similar". It is evasive of the real question to simply point to the ultimate outcome of cases in which this Court upheld Commission orders which extended beyond the narrow illegal practices found to have existed. Commission counsel have not analyzed the holdings of these cases in light of their detailed factual background, and, as they should have, compared those facts and holdings with those of the instant case. Let us proceed to do so.

Colgate-Palmolive, supra, involved television commercials made by Colgate-Palmolive in which a "sandpaper test" was used to demonstrate that Rapid Shave "out shaves them all". Rapid Shave was applied to what was purported to the viewer to be sandpaper and the "sandpaper" was shaved. The evidence before the Commission, among other things, revealed that the material used was not sandpaper but was, in fact, a simulated prop or "mock-up" made of plexiglass to which sand was applied. The Commission's order issued against Colgate-Palmolive encompassed all use of simulated props in demonstrations

presented to the public as genuine unless the fact of the simulation is disclosed in the advertisement. The Supreme Court upheld the scope of the Commission's order.

Thus, the "basic theme"* of *Colgate-Palmolive's* offending conduct was the use of an undisclosed simulation (in that case, it happened to be the use of simulated sandpaper used to sell shaving cream). Extending the order to *all* simulations in the sale of any product was merely an extension of this basic theme. In the case at bar the basic theme of Fedders' offending conduct was its false claim of uniqueness (the characteristic to which the unique claim attached happened to be reserve cooling power). Extending the proscriptions of the Commission's cease and desist order against Fedders to *any* claim of uniqueness of any performance characteristic or other attribute of respondent's products would prohibit a wide variety of variations of that basic theme. On the other hand, to enjoin false claims of the performance characteristics themselves, no matter how limited the class, necessarily intrudes into an area far beyond the basic theme and, consequently, is not "reasonably related" to the offending practice.

In *National Dynamics, supra*, the respondent therein was charged with violations in connection with its advertising of a certain battery additive known as "VX-6". The evidence before the Commission established that the respondent's test reports adequately substantiated its claims concerning the effectiveness of VX-6 except for the claim relating to its durational capacity, which was unsubstantiated. The Commission's order encompassed the use in advertising of independent laboratory tests of *any* products unless same have been substantiated by competent scientific tests, etc. The Court upheld the order as being reasonably related to the violation found to have been committed.

* See discussion and quotation from *Country Tweeds, Inc. v. FTC*, at pp. 11-12 of Fedders' Brief.

The gravamen of *National Dynamics'* illegal activity and, accordingly, the "basic theme", was the use of unsubstantiated laboratory tests. Consequently, the Court held that the Commission did not err in extending the scope of the order beyond the particular type of test conducted, so as to include *any* unsubstantiated test. It was obviously not possible, as it is in the case at bar, to discern the clear difference in nature and effect between the offending misrepresentations found to have occurred and the other potential misrepresentations included in the class covered by the order.

In *Rorer, supra*, wherein the respondent had practiced one particular price discrimination scheme, i.e., granting greater discounts to its retail drug store chain customers than to its independent retail drug store customers, this Court sustained a Commission order, insofar as it affected that class of customers, enjoining all forms of price discrimination. Quite aside from the obvious difficulty of distinguishing discounts from other closely interrelated forms of price discrimination, it is important to note that in *Rorer* the Court, in considering *Rorer's* opposition to the extension of the order beyond the specific unlawful practice found to have existed, laid critical stress upon the flagrancy of the proven illegal conduct, which it deemed to outweigh other favorable factors. The Court pointed out that the discriminatory scheme, practiced by *Rorer* for eight years, had consistently, throughout those years discriminated against thousands of independent stores, and that millions of dollars worth of products were sold pursuant to the scheme. For reasons set forth in *Fedders' Brief*, and further discussed *infra*, *Fedders'* transgressions, though not found to be *de minimis*, cannot, by any reasonable standard, be regarded as flagrant.

A discussion of *Firestone, supra*, in which that case was distinguished from the case at bar, appears at pp. 19-20 of *Fedders' Brief*.

Commission counsel, making reference to the cases cited in Fedders' Brief, argue that they are "wholly inapposite to this case". As the basis for this argument, they assert that the cited cases involved Commission orders prohibiting misrepresentations "in any matter" (Commission's Brief, p. 18). As will be developed at oral argument, this is simply not so.

Implicit in the opinion of the Commission, and carried into Commission counsel's brief, is the thought that an order confined to uniqueness claims would be virtually "toothless". This is evidenced by the following colloquy at the hearing before the Commission between Fedders' counsel and Commissioner Dixon (who wrote the Commission's opinion);

"Commissioner Dixon: What kind of order do you want?

Mr. Wertheimer: Limited to the area of uniqueness. . . .

Commissioner Dixon: Well, that is just like not drawing an order. You might as well ask us to dismiss it.

Mr. Wertheimer: Commissioner, I don't think so.

Commissioner Dixon: Why, you can say anything you want to without saying unique. . . ." (*Transcript of Hearing Before the Commission*, pp. 20-21)

But, as a matter of common knowledge, uniqueness claims are very frequently employed as sales inducements. Consequently it is manifest that an order enjoining the assertion of unsubstantiated uniqueness claims of any kind would compel Fedders to "toe the mark" over a broad and significant area of advertising combat.

POINT III

The Commission's order, and Commission counsel's Brief, deal cavalierly with the background factors that must be given weight in determining the appropriate scope of the order.

Neither the Commission's opinion nor Commission counsel's Brief makes any mention of Fedders prior unblemished record before the Commission.

Moreover, the opinion does not deal with the relative flagrancy of the offense—it concerns itself only with reaching the conclusion that “The magnitude of the false advertising in this case cannot constitute an affirmative defense to the allegations of the Complaint, nor does it give any reason to think that an order is not required to remedy the violation.” (Appendix 88a). However, despite Commission counsel's somewhat disingenuous assertion to the contrary,* that conclusion is not challenged on this appeal. What is challenged is the Commission's failure, in determining the appropriate *scope* of the order, to give weight to the fact that the violation was clearly not a flagrant one.

That a violation is not sufficiently insubstantial to justify dismissing the complaint obviously does not mean that it is necessarily a flagrant violation, and Fedders urges that the following facts, among others, demonstrate beyond question that its violation was *not* flagrant:

(a) The offending advertisements (those claiming uniqueness of reserve cooling power) constitute only 173 out of the 3,109 ads containing reserve cooling power claims placed in the sample area during the sample period

* “The second prong of Fedders attack on the order apparently urges that an order can issue only if a ‘flagrant’ violation exists” (Commission counsel's Brief, p. 19).

—or approximately one out of every sixteen (Appendix 95a, columns 5D and 7E). The other fifteen made no claim of uniqueness, and the Administrative Law Judge concluded that “there was no ‘carry over’ effect on consumers from advertisements claiming uniqueness for reserve cooling power to advertisements merely claiming reserve cooling power.” (Appendix 60a-61a).

(b) The Administrative Law Judge also found that “Examination of the text of these advertisements [i.e., those containing the offending claims] discloses that the unique [reserve cooling power] claim was featured [i.e., emphasized] in only a minority of the advertisements.” (Finding of Fact 20, Appendix 57a). Even this was an understatement, since, as a closer analysis of the ads themselves will indicate, out of the total of 173 ads containing unique reserve cooling power claims, that claim was featured (i.e., was the only claim made, or was emphasized as the featured claim by type, size or position in the ad) in only 36 instances (Appendix 117a). In this connection, Commission counsel, at the footnote to page 21 of their Brief, have challenged Fedders’ counsel’s use of the word “buried” in the following context:

“In the great majority of instances the unique reserve cooling power claim was not featured or otherwise emphasized in the ad but was usually ‘buried’ in small type among a considerable number of other claims.” (Fedders’ Brief, p. 8)

But the offending advertisements (Respondent’s Exhibit 1 before the Commission, forming part of Item 62, entitled “Exhibits-Documentary-Respondent” of the Certified List of Documents Comprising the Record herein) speak for themselves. By way of example, attached hereto, as Exhibit A hereof, are copies of all of such ads as appeared in the five media of largest circulation in the sample, to wit:

Page of Respondent's Exhibit 1 at which ad copy appears	Name of Publication	Circulation	Page of Respondent's Exhibit 1 at which circulation appears
z-22	Philadelphia Inquirer	457,000	z-20
z-21	Philadelphia Community Newspaper	239,000	z-20
z-39	Philadelphia Tabloid	239,000	z-34
(g), (t)	St. Petersburg Independent	172,000	(b)
(c)	Tampa Tribune	170,000	(b)

(c) It is undisputed that the challenged advertisements in the sample area, in terms of their cost, constituted only about seven-tenths of 1% of Respondent's total advertising expenditures and that they were not the dominant theme in a broad-based and intensive advertising campaign, such as, for instance, the "stops 25% faster" claim in *Firestone* or the sensational "shave the sandpaper" television commercial which was the subject matter of *Colgate-Palmolive*.

If we compare these facts to those of *Rorer*, where the offending conduct was not confined, as here, to a minute part of the respondent's practices in the same general field, but was a consistent and uniformly applied discrimination, involving millions of dollars worth of goods sold and employed over an eight-year period, it is clear that *Rorer* is far from being a "remarkably similar case".

Furthermore, it is undisputed (Findings 32, 33, Appendix 62a-63a) that all claims of reserve cooling power were discontinued on December 22, 1971, almost 18 months prior to the issuance of the complaint herein, and that as of the date of the initial decision (July 15, 1974) they had not been resumed.

Whether or not such discontinuance was voluntary, it did take place, and under *Country Tweeds, supra, Swanee*

Paper Corporation v. FTC, 291 F.2d 833 (2d Cir. 1961) *cert. den.* 368 U.S. 987 (1961) and the other cases referred to at pages 20-21 of Fedders Brief, the fact that it did take place is a relevant factor, pointing, as does the lack of flagrancy of the offense, toward an order of moderate scope.

Commission's counsel emphasize far beyond its real significance a uniqueness claim disseminated by a Fedders subsidiary subsequent to the commencement of proceedings before the Commission and some two and one-half years after respondent had completely discontinued its reserve cooling power advertisements. This later claim, made by Mueller Climatrol Corp., a wholly-owned sales subsidiary of petitioner, was to the effect that the rotary compressor incorporated into central air conditioners sold under the "Climatrol" label was exclusive; whereas, in fact, all of the air conditioners which said subsidiary sells are manufactured by Fedders, which itself markets under the "Fedders" label units incorporating the same compressor.

Quite aside from the fact that this single incident was inadvertent, and that steps were promptly taken to rectify it (Appendix, pp. 98a-102a), it was *damnum absque injuria*. It could not have resulted in any competitive injury, since if respondent had advertised that the rotary compressor was exclusive not to its "Climatrol" brand products alone, but (as is the fact) to both its "Climatrol" brand and its "Fedders" brand products, it is impossible to discern how this truthful claim of dual exclusivity would have drawn few customers away from the products of competitive manufacturers than did the inaccurate claim of "Climatrol" brand sole exclusivity.

Nor can it be argued that consumers were injured or otherwise adversely affected by the inaccuracy, since it appears plain that, given the fact of uniqueness of the rotary compressors to Fedders, as the manufacturer hereof, it could make no difference to the consumer whether he bought the unique product under the "Fedders" label or under the "Climatrol" label.

Under the circumstances, respondent urges that this incident, being of trivial significance, should be disregarded.

POINT IV

Fedders failure to heretofore seek to modify the order so as to eliminate the necessity of objective proof of subjective claims does not preclude this Court from granting such relief, which, as a matter of fundamental justice, should be granted.

While Fedders does not quarrel with the general rules enunciated in *Moog Industries v. FTC*, 355 U.S. 411 (1958), *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952), cited at page 23 of Commission counsel's Brief, it is plain that, as stated in *Hormel v. Helvering*, 312 U.S. 552 (1940):

"There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed or passed upon by the court or administrative agency below. . . .

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (312 U.S. at page 557)

The *Hormel* exception is recognized and followed, both in this Circuit (*Blier v. United States Lines Company*, 286 F.2d 920, 922 (2d Cir. 1961); *Troupe v. Chicago D. & G. Bay Transit Co.*, 234 F.2d 253, 259 ftn. (2d Cir.

1956), and elsewhere, *Schenfeld v. Norton Co.*, 391 F.2d 420, 424-425 (10th Cir. 1968).

In the case at bar the fundamental justice is clear. Were the order to stand unmodified, Fedders would be subject to a penalty of \$10,000 per day for making *any* subjective statement as to the air cooling, dehumidification or circulation capabilities of its air conditioners, because it would be obviously unable to furnish "competent scientific, engineering or other similar objective material" as the "reasonable basis" for such statement.

Furthermore, Commission counsel specifically concede, at page 25 of their Brief, that "to the extent that Fedders makes claims that are solely subjective for their product, there is no need for substantiation." Such being the case, what possible objection is there to modifying the order so as to exclude subjective statements from its operation? Fedders concedes that in seeking to limit the order to "statements objective in nature *and capable of objective proof*" (emphasis added), it went further than necessary for its protection.

Commission counsel suggests that the Court should "note" that two other litigants have entered into consent orders containing the same blanket requirement of objective proof to which Fedders objects (Complaint counsel's Brief, page 23 footnote). The best answer to such a suggestion is Commissioner Dixon's and Commissioner Nye's following comment in response to a similar suggestion made by Complaint counsel to the Commission in the case at bar:

"COMPLAINT COUNSEL: We would also point out that the order in this case is very similar to that entered in the consent agreements with Whiripool and Rheem, two cases which grew out of the same advertising substantiation round as the instant case.

"COMMISSIONER DIXON: I want to say to you that that does not impress me any, on quoting something back to us on something we took to consent.

"In a consent, somebody can agree to jump off a Brooklyn Bridge, and that is all right with me.

* * *

"COMMISSIONER NYE: I concur fully with Commissioner Dixon's statement about consent orders. Until the day comes, it is my responsibility to play the Devil's Advocate in reviewing these consent orders, I shall continue to let consenting adults do whatever they want in consent orders, within reason. But I do not like it cited back to me in a case like this, Counsel." (Transcript of Hearing before the Commission, p. 38)

In short, fundamental justice plus the fact that Commission counsel, in essence, themselves concede, as they must, the validity of Fedders' position, not only suggest but demand that the order exclude from its operation claims which are subjective in their nature.

CONCLUSION

The Final Order should be modified so as to limit its scope in accordance with the suggested revision set forth at page 24 of Fedders' principal Brief, and also so as to make it inapplicable to subjective claims.

Respectfully submitted,

WEISMAN, CELLER, SPETT,
MODLIN & WERTHEIMER
*Attorneys for Respondent
Fedders Corporation*

SYDNEY B. WERTHEIMER
JEFFREY H. SCHNEIDER
of Counsel

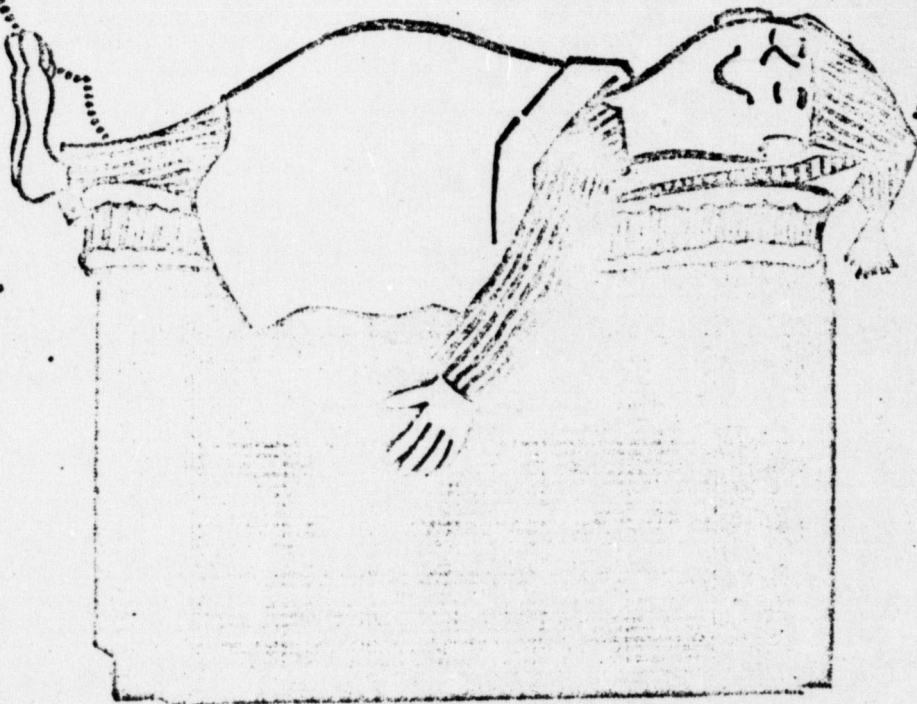
Exhibit A.

The advertisements referred to at pages 11-12, *supra*,

(See opposite page 15)

Phila 69-70

Great night's sleep



model ACRO 8FZZ

FEDDERS (8,000 BTU'S Exceptional VALUE) **\$149⁹⁵** only

8,000 BTU PORTABLE AIR CONDITIONER

Ideal for medium-size bedrooms. Operates on 115 volts.

TAKE IT HOME TODAY... It's only 20" wide, 12½" high... fits in the trunk of your car, fits neatly in your window.*

INSTALL IT YOURSELF... It has accordion-type side panels that unfold to interlock with the window frame. Installation is a matter of minutes.

SLEEP IN COOL, QUIET COMFORT... Fedders approach to sound control lets you enjoy your mid-summer night's dream.

GET ALL THESE GREAT FEATURES... Hi and Lo Cool, adjustable automatic thermostat, fan-only operation for those days when full cooling isn't needed. Plus... exclusive Reserve Cooling Power® for those extra hot, humid days; Flush-Mount design which lets you close drapes; totally enclosed zinc-clad cabinet that shrugs off snow, rain, all weather.

*Fits regular and narrow double-hung windows. Fits sliding windows too with optional kit (extra).

FEDDERS - world's largest selling air conditioner

NOW ONLY AT ...

PETER SADOWINK

Philadelphia
Inquirer

6 Ads Beginning

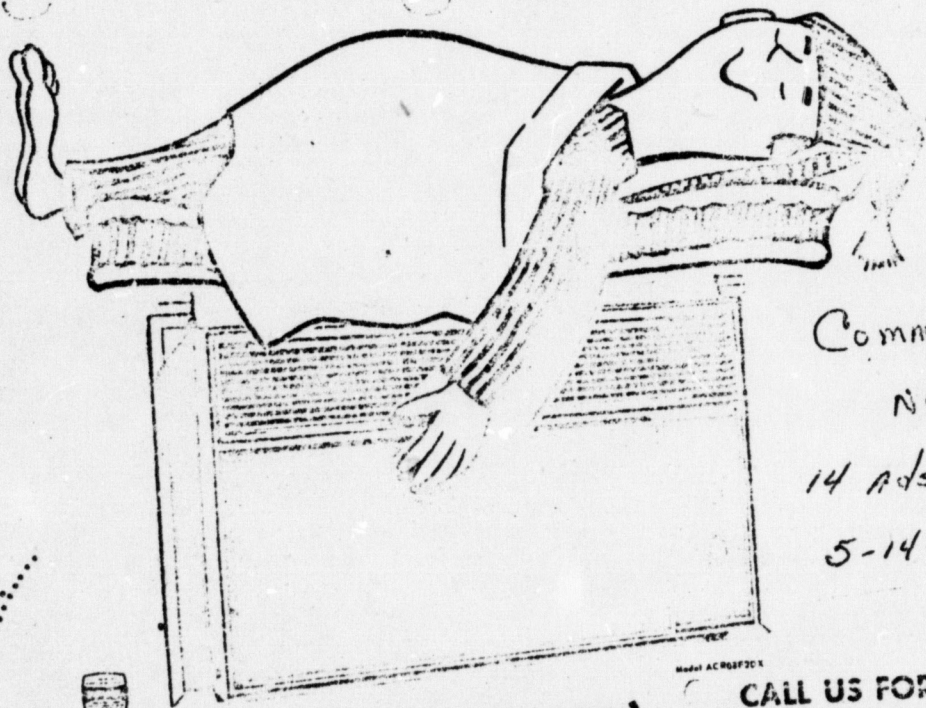
5-28-70

2-22
()

2

Getty home a
great night's sleep

664 line
x.20
122
122



Community
Newspaper
14 Ads.; BEGINNING
5-14-70

FEDDERS (8,000 BTU'S)

CALL US FOR
OUR LOW
LOW PRICE

Ideal for master bedrooms and
moderate-size living rooms

- PICK IT OFF THE SHELF
 - PACK IT IN YOUR CAR
 - TAKE IT OUT OF CARTON
 - PLACE IT IN YOUR WINDOW
 - PULL OUT FLEX-MOUNT SIDES
 - PLUG INTO ADEQUATE 115-VOLT CIRCUIT
- AH...COOL, QUIET SLEEP...IT'S WONDERFUL

This special Fedders 75th Anniversary commemorative air conditioner is easily installed in regular and narrow double-hung windows, and fits sliding windows, too, with optional mounting kit. Great features include: famous Sound Barrier design, handsome walnut-finish front, adjustable automatic thermostat, Hi and Lo Cool, exclusive Reserve Cooling Power[®], directional control of air, totally enclosed zinc-clad steel cabinet. You get quality inside and out... Fedders wouldn't let you have it any other way.

*Special Fedders 75th Anniversary commemorative model compared to comparable capacity standard Fedders model.

**FEDDERS—world's largest
selling air conditioners**

COBBS PARK ELECTRIC
APPLIANCES & FURNITURE CO.

GR 4-1900

2-21
[Redacted]

BUY NOW - PAY LATER!

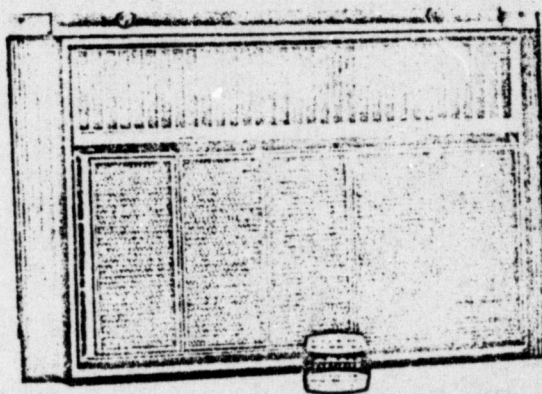
**Save
\$50**

18,000 btu's

\$299⁹⁵
now only

Offer valid
through
Feb. 28, 1971

Regular in-season price \$349.95



EXCLUSIVE ANTI-POLLUTION OPTION

Only Fedders gives you the option of the MedicAir[®] Electronic Air Cleaner attachment. Removes up to 95% of pollutant particles, 99% of pollen. Add it now or when you wish. You can even use MedicAir year-round.



SUPER SPECIAL FEATURES

... Sound Barrier design ... three speeds: Super Cool, Normal, and ultra-quiet Lo ...
handsome antique gold rust-panel finish ... concealed pushbutton controls ...
adjustable thermostat ... advanced 4-way air direction control ... powerful dehumidification ... washable filter with germicidal properties ... Exclusive Reserve Cooling Power[®] for extra hot, humid days

TABloid

1 insertion

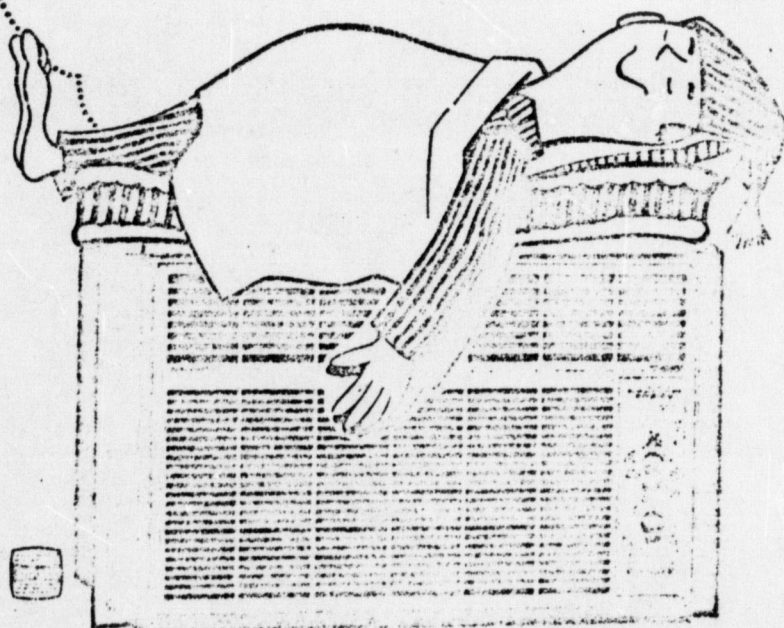
5-17-71

5

2-39

LOW PRICES
1969 MODELS
ONLY A FEW LEFT
SAVE \$20 TO \$50

carry home a
Great night's sleep



Model A200SF20Z

FEDDERS (6,000 BTU'S)
Exceptional VALUE

ALL SIZES IN INVENTORY

6,000 BTU PORTABLE AIR CONDITIONER

Ideal for medium-size bedrooms. Operates on 115 volts.

GET ALL THESE GREAT FEATURES... Hi and Lo Control-adjustable automatic thermostat, fan-only operation for those days when full cooling isn't needed. Plus... exclusive Reserve Cooling Power for those extra hot, humid days! Flush-Mount design which lets you close drapes; totally enclosed zinc-plated cabinet that shrugs off snow, rain, all weather.

*This regular and narrow double-hung window. Fits sliding window. Two with screen at \$10 (extra).

FEDDERS - world's largest selling air conditioner

5-4-70

19D

St. Petersburg Times

(g)

3B

RED RIBBON SPECIAL

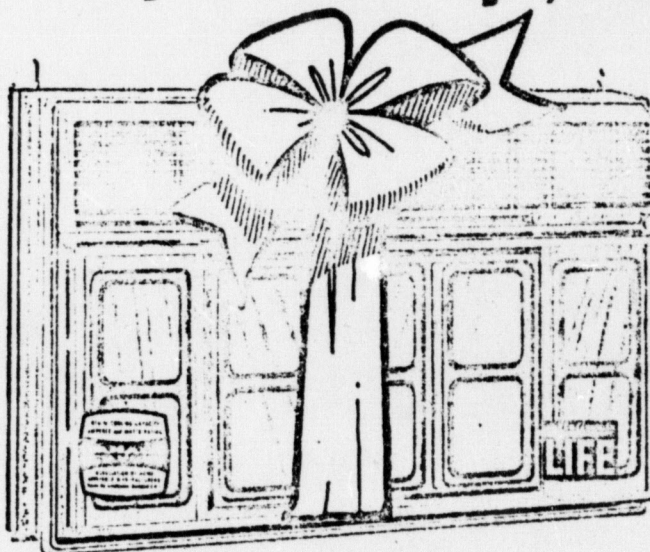
Save \$40 if you buy before May 1, 1971

15,000 BTU's
operates on both
230 and 208 volts

\$229⁹⁵
only

reg. \$269.95

Model ACT15F7EY



Count on really great multi-room cooling and count up the big savings, too. This special Fedders Red Ribbon air conditioner is only 24" wide — packs more comfort for its size than any air conditioner made. Cools large open-plan living dining areas — even an entire floor of a modest home. Cools quietly too, thanks to Sound Barrier design, Fedders *total* approach to sound control. This is the pre-season air conditioner value of the year. Get this famous Fedders today, pocket the savings, and look forward to the most refreshing summer of your life.

- Quiet Sound Barrier Design
- Hand-crafted appearance; concealed controls
- Super Cool and ultra-quiet lo
- Automatic precision thermostat
- Fingertip variable air direction
- Flex-Mount pull-out sides
- Washable germicidal filter
- Powerful dehumidification
- Exclusive Reserve Cooling Power
- Totally enclosed-zinc clad cabinet

Other Great Red Ribbon Values

7,000 BTU's
115 volts, 7.5 amps

only \$179.95

reg. \$209.95

for master bedrooms,
other medium-size rooms

Model AST07F2EY

11,000 BTU's
115 volts, 12 amps

only \$219.95

reg. \$259.95

for large areas,
even two rooms

Model ACT11F2EY

Leon's

FEDDERS

World's Largest
Selling Air
Conditioners



House of Air Conditioning

ST. PETERSBURG Independent

1 Ad 4-22-71

(t)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X

FEDDERS CORPORATION, :

Petitioner, :

- against - :

FEDERAL TRADE COMMISSION, :

Respondent. :

Petition for Review of an Order :
of the Federal Trade Commission :

- - - - -X

Docket No. 8932
CCA 75-4051

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ALICE M. WORTH, being duly sworn, deposes and says:

1. Deponent is not a party to the within action, is over 18 years of age and resides at 329 East 17th Street, New York, New York.

2. On August 22, 1975, deponent served Petitioner's Brief upon Denis Hynes, attorney for the Federal Trade Commission, Respondent in this action, at Federal Trade Commission, Sixth and Pennsylvania Avenue, N.W., Washington, D. C. 20580, Room 556, the address designated by said attorney for that purpose, by depositing two true copies of Petitioner's Brief enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the

United States Postal Service within the State of New York.

Alice M. Worth
Alice M. Worth

Sworn to before me this 22nd
day of August, 1975

Charles Wayne

CHARLES WAYNE
NOTARY PUBLIC, State of New York
No. 30-9554150
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1976